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No. 8779

# In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

*v.*

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA*

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The first opinion of the District Court (R. 384) is reported in 11 F. Supp. 158. Its supplementary opinion (R. 492) is reported in 14 F. Supp. 10.

### JURISDICTION

This is an appeal from a final decree of the District Court of the United States for the District of Nevada, entered on April 14, 1936 (R. 521). This suit was brought by the United States, and the jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended,

28 U. S. C. § 41 (1). The pleadings showing the jurisdiction of the District Court are found in paragraph 1 of the amended bill of complaint (R. 7). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. § 225 (a).

## QUESTIONS PRESENTED

1. Whether by the creation of an Indian reservation by executive action, the United States impliedly reserved, for the Indians (as in the case of reservations created by Treaty), waters flowing through the reservation, for irrigation purposes, where (1) the reservation was established to provide a permanent home for the Indians and to supply them with the means of becoming self-sustaining through agricultural pursuits and (2) all of the lands within the reservation were (and are) arid.

2. Whether, in a suit by the United States to quiet title and to enjoin the diversion of water impliedly reserved for the irrigation of lands within an Indian reservation, the implied reservation of water may be disregarded and relief denied, in whole or in part, because (1) the United States had sold to some of the defendants (or their predecessors) arid lands above the reservation which were irrigable only from the same source as the reservation lands without advising them that the water had been reserved; (2) the defendants had appropriated water and constructed irrigation

works for many years, without protest by the Government until the institution of the instant suit; (3) the superintendent of the reservation had applied to the State for a permit to appropriate waters; and (4) an engineer of the Office of Indian Affairs had recommended that a reservoir be built for the reservation—despite the fact that the suit is brought by the United States in its sovereign capacity and on behalf of the Indian tribe.

## STATEMENT

This suit was brought by the United States to quiet title to its right to 150 cubic feet per second of the water of the Walker River, the amount of water necessary to irrigate the irrigable lands of the Walker River Indian Reservation. The defendants, 253 in number, claim rights in the water of that river.

The amended bill of complaint alleged: On November 29, 1859, the United States, in order to protect certain Pahute and other Indians in lands which they were occupying, and in order to afford them an opportunity to learn husbandry and to become civilized, set aside for their use lands now constituting the Walker River Indian Reservation (R. 8–9). These lands were (and are) incapable of producing crops without irrigation, for which the Walker River and its tributaries are the only source of water (R. 7–11). Approximately 11,000 acres of these lands are irrigable, and for the irrigation of this acreage and for domestic and other

uses upon the reservation there is required 150 cubic feet per second of water (R. 9). By the creation of the reservation the United States reserved from appropriation, and set aside for use upon the reservation, that quantity of the water of the Walker River and its tributaries (R. 10). About 2,000 acres of the reservation lands are irrigated at the present time (R. 9). The defendants are using the water of the river and its tributaries for irrigation and are preventing it from reaching the reservation (R. 12). The United States recognizes the decree in *Pacific Livestock Co.* v. *Rickey,* Equity No. 731, adjudicating rights in the waters of Walker River, as determining the rights of the defendants as among themselves (R. 15).

The complaint prays that it be adjudged that the United States has the first right to 150 cubic feet per second of the water of the river; that the defendants be enjoined from interfering with that right; that a water master be appointed to carry out the decree; that the relative rights of the parties in the water of the river be determined; and that the United States have such other relief as may be proper (R. 17–18).

Some 250 answers and counterclaims were filed by the respective defendants.[1] The defendants

[1] By stipulation (R. 995) the answers and counterclaims of 231 defendants are omitted from the printed record. The omitted answers are in substance the same as the seven answers printed in the record.

deny that when the United States created the reservation it reserved water for the Indians, and deny that they are wrongfully diverting water (R. 29, 33, 60, 62, 108, 110, 128, 131, 150, 153, 177, 179, 217, 220). The defendants admit that they are diverting water under the decree in suit No. 731 (R. 37, 66, 114, 136, 158, 184, 225), and allege rights to use specified quantities of the water of the Walker River, with stated dates of priority, for the irrigation of their respective lands (R. 40, 68, 84–92, 115, 140, 163–170, 184–187, 229–232). The defendants further allege that the United States, through its officers and agents, knew of the claims of the defendants; that the United States without objection permitted them to expend millions of dollars for irrigation works, houses, and other improvements; that the United States issued patents to some of the defendants under the Desert Land Law and the homestead laws, under which laws a showing of a sufficient water right was a condition precedent to the issuance of a patent (R. 95–96, 119–121, 159–160, 190–192, 197, 227–228); and that by reason of these facts the United States is estopped from claiming any water by virtue of its withdrawal of lands for the Indian reservation, or otherwise than under the doctrine of appropriation (R. 96, 121, 160, 193, 228). Some of the defendants allege also that the United States has been guilty of laches (R. 138, 160, 228). The defendants pray that the United States take nothing

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and that the water rights claimed by the respective defendants be decreed to them (R. 47, 97, 122, 143, 172, 212, 241). The answer of the Sierra Pacific Power Company claims riparian rights for its land in California, and alleges that its rights were not determined by decree No. 731 (R. 387).[2]

The issues raised by the pleadings were referred to a Special Master (R. 243–244). The United States and the defendants (except the Sierra Pacific Power Company), in order to shorten the trial, stipulated that all of the defendants' rights should be determined upon the doctrine of appropriation, and that the rights of all defendants who were parties to suit No. 731 should stand as therein decreed, subject to the rights and priorities of the United States as determined by the court (R. 501, 973). The rights of a number of defendants who were not parties to suit No. 731 were stipulated upon the same basis (*id.*).

In summary, the evidence showed:

The Walker River is non-navigable. It rises in California, but its main course lies in Nevada, and it empties into Walker Lake in that State (R. 387–389, 494–496). The Walker River Indian Reservation includes the land around Walker Lake, and the land along each side of the river for approximately 30 miles above the lake. It contains approximately 86,400 acres of land, of which about

[2] No appeal has been taken by the Sierra Pacific Power Company, and no separate question as to its rights is presented to this court.

10,000 acres are irrigable and about 2,100 acres are now under irrigation (R. 246, 496, 627). The lands of the Walker River basin, including the reservation lands, are incapable of producing crops without irrigation, and there is no water for their irrigation except that of the river (R. 496).

In 1859 the lands now included in Nevada were a part of Utah Territory. On November 25, 1859, the United States Indian agent for that Territory wrote the Commissioner of Indian Affairs that there was a general "stampede" of persons from California to the mining localities within the agency, which increased the necessity for reserving for the Indians "a sufficient portion of their lands to enable them to sustain life" (R. 569). He recommended that part of the Truckee River valley (now the Pyramid Lake Indian Reservation), and part of the Walker River valley (now the Walker Lake Indian Reservation), be reserved for the Indians, the boundaries of the suggested reservations being indicated on an attached map (R. 570). On November 26, 1859, the Commissioner of Indian Affairs wrote the Secretary of the Interior inviting the latter's attention to the agent's letter and stating that although but a small portion of the land in the proposed reservations is "suited for agricultural purposes, yet it is believed that it will be sufficient for the sustenance of the Washoe and Pahute Tribes of Indians, in connection with the fish which they may obtain from Pyramid and

Walker Lakes" (R. 571). On November 29, 1859, the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office requesting him to direct the Surveyor General of Utah Territory to respect the reservation of these tracts of land, as indicated upon an attached map, when the public surveys should be extended over that portion of the territory, and requesting that in the meantime the proper local land offices be instructed to respect the reservations upon the books of their offices (R. 572). The Commissioner of the General Land Office, on December 9, 1859, instructed the Surveyor General at Salt Lake City to reserve for Indian purposes the tracts of land in question (R. 573). The United States took immediate steps to prevent trespassing upon the reservations and subsequently their boundaries were surveyed (R. 577–581, 595, 596). On March 19, 1874, President Grant ordered that the reservation on Walker River, as surveyed, be withdrawn from sale or other disposition, and set apart for the Pahute Indians residing thereon (R. 580–581). The reservation had, however, been effectively created on November 29, 1859, when the lands were set aside for the Indians by the Commissioner of the General Land Office; the subsequent order of the President merely formalized and perpetuated what had already been done (R. 587, 588, 591, 593–594, 599, 648–651, 671–675).[3]

[3] Both the Master (R. 258–260) and the District Court (R. 392) found that the reservation was created November

Both the United States and the Indians desired, from the time the reservation was created, that the Indians should support themselves by agriculture (R. 587, 591, 592, 599). The United States immediately began to encourage and teach the Indians to practice farming and irrigation, and furnished them with seeds and implements for farming (R. 587, 588, 591, 593–594, 599, 648–651, 671–674). Within a few years after the reservation was set aside the United States commenced the construction of ditches and dams for the diversion of water of the Walker River for use upon the reservation (R. 434, 673, 674–675). From time to time the United States enlarged and extended the irrigation ditches upon the reservation until there are now two canals thereon having a combined length of 17 miles and a combined capacity of 115 cubic feet per second, and lateral ditches having a combined length of 13 miles (R. 434, 496, 617) capable of irrigating 3,600 acres without further extension (R. 614). On the 2,100 acres under irrigation the Indians produce valuable crops of alfalfa, grain, and vegetables, and raise fowl and livestock, part of which they sell (R. 434, 617). There are approximately 500 Indians on the reservation (R. 275, 496). Ninety-six individual Indians are farm-

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29, 1859. The authorities sustaining their view are collected in the Master's report (R. 258–260). Particularly conclusive are *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283, 288; *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Central Pacific Railway Company*, 45 L. D. 502.

ing parts of 140 allotments of 20 acres each and 96 allotments have homes on them (R. 434, 496). Five hundred and four allotments have been made to date (R. 656).[4]

The lands of the defendants are situated in the Walker River basin above the reservation. They were acquired by the defendants or their predecessors from the United States under acts of Congress, the earliest title originating shortly after the creation of the reservation (R. 497). Successive appropriations of water of the river were made for the irrigation of these lands, the earliest appropriation being in 1860 (R. 497), until all the water of the river had been fully appropriated (R. 270–271, 398). In order to supplement the water supply for irrigation the defendants, in 1922 and in 1924–25, constructed large and expensive irrigation works (R. 497, 625, 778). The defendants now irrigate a total of about 111,000 acres (R. 499). No objection was made by the United States to the appropriation of water by the settlers (R. 270–271, 398–399, 497–498), or to their construction of irrigation works (R. 497), and no proceedings were taken by the United States to protect its water rights until the present suit, brought in 1924 (R. 402, 497–498).

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[4] Allotments were made in November 1906, under the Act of May 27, 1902, 32 Stat. 260, and the General Allotment Act, 24 Stat. 388. The trust period of 25 years provided by the General Allotment Act was extended for an additional 10 years by Executive Order No. 5730, issued October 8, 1931, and was extended indefinitely by the Wheeler-Howard Act of 1934, 48 Stat. 984.

The United States was given an opportunity to become a party to suit No. 731, which was brought in 1904 and decided in 1919, but did not do so (R. 497–498). The Master in that suit found that the United States had appropriated from the Walker River 22.93 cubic feet of water per second, with dates of priority of 1868, 1872, 1875, 1883, and 1886, and had irrigated thereby 1,905.55 acres of land of the reservation (R. 387, 437, 499). The decree did not make any provision for the rights of the United States (R. 786).

In 1910 the superintendent of the reservation, on behalf of the Indians, applied to the State of Nevada for a permit to appropriate water of the river (R. 498, 822). The permit was granted but later cancelled (R. 824).

In 1926 Congress (Act of June 30, 1926, 44 Stat. 779) authorized a reconnaissance to determine the feasibility of constructing a dam on the Walker River to conserve its water for irrigation (R. 399–400, 498). Pursuant to this authorization a report was made recommending, among other things, that a storage reservoir be created for the reservation (R. 400–401, 498). It does not appear from the record that any action was taken on this report.

The Master filed his report (R. 244) and recommended findings of fact and conclusions of law (R. 291) and a decree (R. 317). The report of the Master expressed the view that when the United States created the reservation in 1859 it impliedly

reserved water of the Walker River for the irrigation of reservation lands (R. 261–270); that the United States was not estopped by the failure of its officials to inform purchasers of land in the Walker River valley of its right to the use of sufficient water of the river for the irrigation of the irrigable lands of the reservation, or by reason of the delay of its officials in taking legal steps to enforce its claims (R. 271–274); that, however, it would be inequitable to allocate to the United States water for the irrigation of 10,000 acres of land since it had under irrigation only 2,100 acres, since there was no substantial demand by the Indians for the irrigation of additional acreage, and since the number of Indians on the reservation was not increasing (R. 275). The Master concluded, accordingly, that the United States should be granted a right to 26.25 feet of water per second, for the irrigation of 2,100 acres of land, with a priority of 1859 (R. 275, 323).

Both the United States and the defendants filed exceptions to the Master's report and proposed findings, conclusions, and decree (R. 335–360), the United States contending that it had a right to the use of 150 cubic feet of water per second for the irrigation of the 10,000 acres of irrigable lands in the reservation, and that this right was not barred by any equitable defense (R. 335–342).

On June 6, 1935, the District Court filed its opinion (R. 384, 11 F. Supp. 158). The District Court

held that neither the claim of the United States to 150 cubic feet of water per second nor the proposed decree of the Master awarding to it 26.25 cubic feet with a priority of 1859 could be sustained (R. 409–410). It held that the United States did not impliedly reserve any water by the creation of the reservation, and that the rights of the United States were, therefore, to be adjudged under the doctrine of appropriation as established by the State of Nevada (R. 410).[5] The Court referred the case back to the Master to take further evidence upon one point, and directed him to prepare and submit findings of fact and conclusions of law consistent with its decision (R. 427–428).

The Master again filed recommended findings of fact, conclusions of law, and a decree (R. 430, 458). After argument on exceptions filed by the United States and by some of the defendants (R. 474–490), the District Court, on March 21, 1936, filed a supplementary opinion (R. 492, 14 F. Supp. 10). This opinion, after stating that the United States contends that there was an implied reservation of water, declares (R. 492):

> Even if a reservation of water may be implied in the executive order, however the Indian rights may be defined or labeled in

[5] The opinion of the District Court devotes considerable space to demonstrating that by the Desert Land Act of 1877, if not before, the United States opened the waters of the streams of the public domain to appropriation under state laws, such appropriation to be "subject to existing rights,"

> this instance, this court is of the opinion that the facts and circumstances have placed the white settlers in an inexpugnable position.

The opinion then recites that the settlers acquired lands from the United States and water rights by appropriation; that they have enjoyed undisturbed possession of their lands and water rights for more than fifty years, and that to dispossess them would return to waste lands which they, with the acquiescence of the government, reclaimed from the desert (R. 492–493). The opinion concludes (R. 493):

> Under such facts and circumstances this court is not moved to give a decree destroying the rights of the white pioneers.

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and that, if water of the Walker River was not impliedly reserved by the creation of the reservation in 1859, before the Desert Land Act, the United States has only such water rights for the reservation as it has itself acquired by appropriation (R. 403–410). *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, is quoted at length to sustain this position. The United States, however, has always conceded that, if no water was impliedly reserved by the creation of the reservation, it has only such water rights as it has acquired by appropriation. And the opinion of the District Court concedes that if water was impliedly reserved by the creation of the reservation, that reservation of water was not affected by the Desert Land Act, since that Act provided that appropriations of water under it would be "subject to existing rights" (R. 410). Accordingly it is not perceived that this portion of the District Court's opinion presents any issue warranting further discussion.

The exceptions of the United States were overruled (R. 492–493).

Thereafter the District Court filed findings of fact and conclusions of law, and entered its decree (R. 494). In its conclusions of law the Court states that even if a reservation of water might be implied in the order of 1859, "yet the facts and circumstances here shown impel the conclusion that the interests of the white settlers, enjoyed without challenge for more than fifty years, should not be disturbed" (R. 515). The Court concluded that the doctrine of appropriation applied to the claims of the United States, and that it was entitled, by right of appropriation,[6] to divert waters of the stream to the extent of 22.93 cubic feet per second, for the irrigation of 1,905.55 acres, with priority as of the years 1868, 1872, 1875, 1883, and 1886 (R. 499, 515–516). The District Court entered its decree framed accordingly (R. 531).

The United States has taken this appeal.

## SPECIFICATIONS OF ERRORS TO BE URGED

The United States will rely upon its assignment of errors Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11. Assignment No. 2 is waived, as it is not believed that this assignment is pertinent to the legal issues here involved.

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[6] The Special Master in suit No. 731 had found, and it was conceded by the defendants in this suit, that the United States had appropriated a total of 22.93 cubic feet per second, with the dates of priority given above (R. 499).

SUMMARY OF ARGUMENT

I

The United States, when it segregated the lands in the Walker River Indian Reservation on November 29, 1859, as a permanent home for the Pahute Tribe of Indians, impliedly reserved for the Indians sufficient water of Walker River for the irrigation of the irrigable lands of the reservation. *Winters* v. *United States,* 207 U. S. 564; *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (C. C. A. 9). The doctrine that when the United States sets aside arid lands as a home for Indians it impliedly reserves for the Indians water for irrigation, rests upon a presumption that the United States recognized and provided for the needs of the Indians, and does not depend upon whether there was a treaty or agreement with the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78.

II

The United States is not, under the facts and circumstances of this case, barred from the relief it seeks, either in whole or in part, by laches, estoppel, or any other principle of equity. This suit is brought by the United States in its sovereign character (*United States* v. *Minnesota,* 270 U. S. 181, 194), and the United States cannot, in a suit so brought, be barred by laches. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735; *United States* v. *Beebe,* 127 U. S. 338, 344.

Even if it be assumed that the United States can, under some circumstances, be estopped, the acts and omissions relied upon in this case as estopping the United States are largely disposed of by the rule that the United States cannot be estopped by unauthorized conduct of its agents. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *Cramer* v. *United States,* 261 U. S. 219, 234. Furthermore, elements essential to an estoppel between individuals are lacking in this case. No estoppel arises from mere delay or acquiescence, even when expenditures are made in reliance thereon. *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427, 454 (S. D. Calif.); *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298 (C. C. A. 5). Before an estoppel can arise there must be "intended deception" or "such gross negligence * * * as to amount to constructive fraud, by which another has been misled to his injury." *Brant* v. *Virginia Coal & Iron Co.,* 93 U. S. 326, 335. That has not been shown here. Finally, the Indians are wards of the United States, and the conduct of a guardian cannot estop a ward. *Shamleffer* v. *Peerless Mill Co.,* 18 Kan. 24.

The right of the Indians is not to be limited by any application of general concepts of fairness to water only for the irrigation of the reservation lands now irrigated. No principle of equity would justify such a diminution of their right. *Pan American Co.* v. *United States,* 273 U. S. 456;

*Heckman* v. *United States,* 224 U. S. 413. The decision of this court in *Conrad Inv. Co.* v. *United States,* 161 Fed. 829, is conclusive that the Indians are entitled to be protected in their right to water sufficient not only for their present needs but for their possible future needs.

## ARGUMENT

### I

**The United States, by the creation of the Walker River Indian Reservation, impliedly reserved for the Indians sufficient water of the Walker River for the irrigation of the irrigable lands of the reservation.**

This argument is directed to the following assignments of error:

I

> That the Court erred in failing to find and decree that the plaintiff, by necessary implication, set aside and reserved sufficient of the then unused and surplus waters of the Walker River and its tributaries for the future irrigation of the irrigable lands of the Walker River Indian Reservation, at the same time it reserved and set aside the lands for said Indian Reservation on November 29, 1859 (R. 541).

VI

> That the Court erred in making its conclusion of law I that the law or Doctrine of Appropriation applies in this case to plaintiff, and the same is erroneous, contrary to law and not sustained by the evidence of findings in this cause (R. 544).

VII

That the Court erred in making its conclusion of law II that plaintiff is entitled only by right of appropriation to the amounts of water from the stream system with the priorities and points of diversion for the irrigation of the acreages set forth in the findings (R. 544).

VIII

That the Court erred in overruling plaintiff's exceptions filed herein January 18th, 1933, and September 26th, 1935, to the Special Master's findings and proposed decrees filed herein December 30th, 1932, and August 9th, 1935 (R. 545).

IX

That the Court erred in not finding and decreeing that said Reservation included 10,000 acres of irrigable land susceptible of irrigation.

X

That the Court erred in not finding and decreeing that plaintiff reserved the right, by setting aside and reserving said Walker River Indian Reservation, on November 29, 1859, to divert water from the Walker River, to the extent required for the irrigation of the cultivated lands of said Reservation, up to, but not to exceed, a total of 10,000 acres, and that the diversion of such water be limited

to a flow at the rate of 1.50 cubic feet of water per second of time for each 100 acres of such cultivated lands from March 1st to September 30th of each year (R. 545).

XI

That the Court erred in not holding and decreeing that plaintiff had the present right to divert 31.50 cubic feet of water per second of time from the Walker River for the irrigation of 2,100 irrigable acres of said Walker River Indian Reservation, with a priority of November 29, 1859, instead of 1,905.55 irrigable acres with priorities of the years 1868, 1872, 1875, 1883, and 1886; and further in not holding and decreeing that plaintiff had the further right to divert such additional amounts of water with a priority of November 29, 1859, as may be required from time to time, at the same rate of flow, for the irrigation of such additional irrigable lands as may in the future be placed in cultivation up to, but not to exceed, a total of 10,000 acres (R. 546).

In *Winters* v. *United States,* 207 U. S. 564, affirming 143 Fed. 740, 148 Fed. 684 (C. C. A. 9), the Supreme Court held that the creation of an Indian reservation (in that case by agreement between the United States and the Indians, ratified by act of Congress) impliedly reserved for the Indians, and withheld from subsequent appropriation by others, water of the streams of the reservation for the irrigation of their lands.

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. (207 U. S. 564, 576.)

This contention, the court said, could not be accepted, especially in view of the rule that agreements with Indians are to be construed in favor of the Indians. The court rejected also the further contention that the United States had repealed the reservation of water for the Indians by the admission into the Union of Montana, the State in which the reservation was situated. It would be extreme to believe, the court said, that Congress—

> took from them the means of continuing their old habits, yet did not leave them the power to change to new ones. (207 U. S. 564, 577.)

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The doctrine established by the *Winters* case was thus stated by this Court in *Conrad Inv. Co.* v. *United States,* 161 Fed. 829, 831–832:

> This court affirmed the decree [in the Winters case], holding that the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk river for the benefit of the Indians on the reservation to the extent reasonably necessary to enable them to irrigate their lands, and that grantees and settlers on public lands outside of their reservation could not acquire, under the desert land laws of the United States or the laws of the state of Montana relating to the appropriation of the waters of the streams of that state, the right to divert the waters of Milk river to the prejudice of the rights of the Indians residing upon that reservation. * * *
>
> The law of that case is applicable to the present case, and determines the paramount right of the Indians of the Blackfeet Indian reservation to the use of the waters of Birch creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes. The Government has undertaken, by agreement with the Indians on these reservations, to promote their improvement, comfort, and welfare, by aiding them to become self-supporting as a peaceable and agricultural people. The lands within these reservations are dry and arid, and require the di-

> version of waters from the streams to make them productive and suitable for agricultural, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case.

The *Winters* and *Conrad Inv. Co.* cases have been followed in *United States* v. *Powers,* 94 F. (2d) 783 (C. C. A. 9, 1938); *United States* v. *Parkins,* 18 F. (2d) 642, 643 (D. Wyo. 1926); *United States* v. *Hibner,* 27 F. (2d) 909, 911 (D. Idaho, 1928); *United States* v. *Cedarview Irrigation Co.* and *United States* v. *Dry Gulch Irrigation Co.* (Equity Nos. 4427 and 4418, D. Utah, 1923—unreported); *United States* v. *Orr Water Ditch Co.* (Equity Docket A–3, D. Nev., 1926—unreported); *United States* v. *Morrison Consol. Ditch Co.* (Equity No. 7736, D. Colo., 1931—unreported); *Anderson* v. *Spear-Morgan Livestock Co.,* 79 P. (2d) 667 (Mont. 1938). And compare *Skeem* v. *United States,* 273 Fed. 93 (C. C. A. 9, 1921); *Mason* v. *Sams,* 5 F. (2d) 255 (W. D. Wash. 1925).

The Master held that the doctrine of the *Winters* case applied to the case at bar; that the creation of the reservation in 1859 impliedly reserved for the

Indians waters for the irrigation of the reservation lands. He said (R. 261–262):

> The Reservation was established for the use of the Indians. Was it the intent that the Reservation should consist merely of a refuge for the Indians where they might hunt and fish? The whites had encroached upon the greater portion of the lands upon which the Indians had theretofore been accustomed to hunt and fish. The game has been driven off. The sustenance for the Indians was becoming more and more limited, and if the Indians were to be supplied with the necessaries of life in any other manner than through the system of charitable donations, the pursuit of agriculture upon the Reservation was an actual necessity. Furthermore, if the Government did not contemplate the support of the Indians through the pursuit of agriculture, why did it reserve ten thousand acres, or thereabouts, of irrigable land lying on either side and along the Walker River, why not have included only Walker Lake, the fishing ground of the Indians, and the larger area of rough country unsuitable for irrigation? That the Government had broader views for the sustenance of the Indians is evidenced by the fact that shortly after the Reservation was established steps were taken to promote thereon agricultural pursuits by the construction of ditches, to convey water for irrigation purposes. Said ditches have from

> time to time been enlarged and extended until there are at present seventeen miles of main canals and thirty miles of lateral ditches constructed for the diversion of water from Walker River and the Government has applied water from the river to approximately two thousand one hundred acres of irrigable lands.

The record is specific that the reservation was created to reserve for the Indians sufficient of their lands to enable them to sustain life (R. 569), and that it was contemplated that the Indians would support themselves partially by agriculture (R. 571, 582, 587). That the lands of the reservation can be cultivated only if irrigated is not disputed.

The District Court held, in its first opinion, that the creation of the Walker River Indian Reservation did not impliedly reserve water for the irrigation of the reservation lands (R. 403–410). The *Winters* case, it said, was based solely upon a treaty or agreement with the Indians, while there was no treaty or agreement in this case, and, indeed, could have been none because the Indians and whites were at war for some time subsequent to 1859 (R. 396). In its supplementary opinion the District Court did not decide whether there was an implied reservation of water for the Indians, but said that even if there was, "facts and circumstances" had placed the settlers in an "inexpugnable position." (R. 492.)

The doctrine of the *Winters* case, the United States contends, is controlling here. That doctrine, it is submitted, does not depend upon whether or not a reservation was created pursuant to an agreement with the Indians, as the District Court held in its first opinion, but upon the principle, followed by the Master, that when the United States sets aside as a home for Indians lands which would be sufficient for their support only if cultivated, and which could be cultivated only if irrigated, it must be inferred that the United States reserved for the Indians water for the irrigation of the reservation lands.

In the *Winters* case, it is true, the Supreme Court emphasized that the Indians had agreed to the creation of the reservation, and that they probably would not have so agreed unless water for irrigation had been reserved for them (207 U. S. 564, 576). But the Court also expressed disbelief that the United States would have deliberately accepted an agreement not reserving water to the Indians (*id.*), and it said, in rejecting the contention that Congress had subsequently taken the water from the Indians, that "it would be extreme to believe" that Congress "took from them the means of continuing their old habits yet did not leave them the power to change to new ones." (207 U. S. 564 at 577.) The latter consideration, it is clear, is the decisive one: when the United States fixes as a permanent home for Indians lands which will sup-

port them only if irrigated, it must be presumed that water for irrigation is reserved for the Indians, regardless of what particular procedure was followed in creating the reservation.

> The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require. (*United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123, 129.)[7]

That the doctrine of implied reservation of waters for Indians rests upon a presumption of recognition of and provision for their needs by the United States, and is not dependent upon a treaty or agreement with the Indians, is conclusively shown by the decision of the Supreme Court in *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78. That was a suit by the United States to enjoin the defendant from maintaining a large fish trap in navigable waters adjacent to the Annette Islands in Alaska. The United States had by act of Congress set apart "the body of lands known as Annette Islands" as a reservation for the use of the

[7] The Court added: "Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art."

Metlakahtla Indians. No agreement or treaty was involved, and the Indians had no claim to the Islands, they having but recently immigrated from Canada. The question presented was whether the reservation was limited to the Islands proper, as the defendant contended, or whether it included the waters adjacent to the Islands, so as to confer upon the Indians exclusive fishing rights in those waters. The act was silent in this respect. The Supreme Court held for the United States. The question, it said, was to be determined in view of "the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians, and the object to be attained." (P. 87.) The opinion continues (pp. 87–89):

> That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. * * * The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. * * *
>
> The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. * * *

> The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette Islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. * * *
>
> This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.

The doctrine of the *Winters* case was applied, although the reservations involved were created by federal executive action, and not by or pursuant to any agreement with the Indians, in *United States* v. *Cedarview Irrigation Co., United States* v. *Dry Gulch Irrigation Co.* (Equity Nos. 4427 and 4418, D. Utah, 1923—unreported); and in *United States* v. *Orr Water Ditch Co.* (Equity Docket A–3, D. Nev., 1926—unreported). The *Orr Water Ditch Co.* case was decided by the same court which decided the present case, and it involved the Pyramid Lake

Indian Reservation, which, it will be remembered (see *supra,* p. 7), was created at the same time and by the same order as the Walker River Indian Reservation. The restraining order in that case, signed by Judge Farrington, which is still in effect, recites:

> By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848, and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

Neither the courts nor the administrative officers of the United States have made any distinction between reservations created by executive action and reservations established by treaty, either as to the duties of the United States toward the Indians or as to the character or extent of the Indian rights. In *Spalding* v. *Chandler,* 160 U. S. 394, the court said (pp. 402–403):

> When Indian reservations were created, either by treaty or executive order, the In-

> dians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

In *M'Fadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670 (reversed on other grounds, 180 U. S. 533), this court said (p. 673):

> On the 9th day of April 1872, an executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians [certain lands] * * * The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes.

Similarly, in *Gibson* v. *Anderson,* 131 Fed. 39, this court, after quoting from the *M'Fadden* case, said (p. 42):

> There can be no doubt that such a reservation [executive order] stands upon the same plane as a reservation made by treaty or act of Congress.

In 34 Op. Atty. Gen. 171, Attorney General (now Mr. Justice) Stone, in giving it as his opinion that the oil and gas leasing act applied to executive order reservations, said (p. 181):

> The important matter here, however, is that neither the courts nor Congress have made

> any distinction as to the character or extent of the Indian rights, as between executive order reservations and reservations established by treaty or act of Congress.

Indeed, it is difficult to see upon what theory the circumstance whether a reservation was created pursuant to an agreement with the Indians, or solely upon the initiative of the United States, can be regarded as decisive of whether water was impliedly reserved for the Indians. It is not to be thought in the one case any more than in the other that the United States meant to deprive the Indians of all possibility even of sustaining themselves by agriculture. It cannot be doubted that the United States had power to create the reservation and assign the Indians to it regardless of their consent. See *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565.[8]

Whether Indian reservations have been created pursuant to agreements with the Indians or by decision of the United States alone appears to have been largely a matter of chance. For example, while the reservation involved in the *Winters* case

[8] The District Court apparently thought that the reservation was created, not only without a formal agreement between the United States and the Indians, but against the will of the latter (R. 396–398). It appears from the record, however, that the reservation was set aside for the protection of the Indians and in order to placate them (R. 569–570, 575, 585–586). It seems probable, therefore, that the creation of the reservation had at least the tacit consent of the Indians.

was created pursuant to an agreement with the Indians, the larger reservation out of which it had been carved had been created by act of Congress without any agreement with the Indians. See 207 U. S. 564, 567; Act of April 15, 1874, 18 Stat. 28. To decide the water rights of the Indians according to this fortuitous circumstance would be palpably unjust.

II

**The United States is not barred from the relief it seeks by laches, estoppel, or any other principle of equity.**

This argument is directed to the following assignments of error:

III

> The Court erred in making and adopting that portion of finding No. V, finding that it has not been shown that there is the necessity or demand by the Indians for the cultivation of a larger area of land than 2,100 acres (R. 542).

IV

> The Court erred in finding:
>
> > That plaintiff failed to make objection to appropriations of water by white settlers (defendants) and to their construction of expensive irrigation works (finding VI);
> >
> > That plaintiff took no proceedings to determine or preserve its rights as against upstream white settlers until the commencement of this suit (finding VI);

That plaintiff failed to become a party to a former suit to determine the relative rights of the stream, commenced in 1904 and determined in 1919, although plaintiff was invited to file its pleadings therein (finding VI);

That plaintiff, as late as 1910, relied upon the Doctrine of Appropriation for its rights (finding VI);

That Congress authorized a reconnaissance to determine cost and feasibility of a reservoir site for said Indian Reservation (finding VI);

That the Supervising Engineer recommended to the Government that a storage Reservoir be created for the Indian lands of said Walker River Indian Reservation by construction of a dam site and that the irrigation system thereof be extended to cover the entire irrigable area of the Reservation (finding VI);

That it was found by Special Master Henry Thurtell, in a former suit to which the United States was not a party, that the United States of America had appropriated from the Walker River and applied to beneficial use upon the lands of said Reservation for the use of the Indians the quantities of water in cubic feet per second with dates of priority and the number of acres irrigated thereby, set forth in finding VI and in the decree;

That at the time of the commencement of this suit the annual crop pro-

duction of lands irrigated by white settlers was of the value upwards of $2,000,000 (finding IX);

That the assessed valuation of the lands within the boundaries of defendant, Walker River Irrigation District, is approximately $4,000,000 (finding IX);

That the population of said defendant District is approximately 3,000 and that of Bridgeport and Antelope Valleys in California is approximately 600 (finding IX);

and the Court further erred in concluding and decreeing from said findings that plaintiff was barred and estopped from claiming and being decreed a right to divert and use water of said stream system for the irrigation of the irrigable lands of said Indian Reservation to the extent required each year for the irrigation of such of said lands as may then be in cultivation, up to, but not to exceed, a total of 10,000 acres with a priority as of November 29, 1859 (R. 542–544).

V

That the Court erred in making its conclusion of law that even if a reservation of water may be implied by setting aside the Walker River Indian Reservation, on November 29, 1859, yet the facts and circumstances shown in evidence impel the conclusion that the interests of the white settlers

> (defendants herein), enjoyed without challenge for more than fifty years, should not be disturbed (R. 544).

The defendants, in their answers, contended that even if the United States did, by the creation of the reservation in 1859, impliedly reserve water of the Walker River for the Indians, the United States is now estopped from claiming any water for the Indians other than under the doctrine of appropriation, by reason of certain facts alleged in the answers (R. 93–96, 119–122, 137–138, 159–160, 190–193, 197–199, 208–211, 227–228).[9] Some of the defendants contended also that the United States has been guilty of laches (R. 138, 160, 228).

The Master expressed the view that the United States is not estopped to assert the implied reservation, but that "equitable principles" limit its rights to water for the acreage now under irrigation on the reservation (R. 273–275).

The District Court, in its first opinion, held that the creation of the reservation did not impliedly reserve water for the Indians, and that the water rights of the United States were therefore to be adjudged in accordance with the laws of appropriation as established by Nevada (R. 410). Although that opinion states at some length the facts cited by the defendants as estopping the United States, it

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[9] The allegations thus relied upon are summarized, *supra*, p. 5. The evidence bearing upon these allegations is summarized, *supra*, pp. 10–11.

does not rely upon them other than by the assertion that (R. 403):

> All of such actions and circumstances above related, when considered with the "silent acquiescence" of the government to the diversion of water by the white settlers, amount to an administrative construction of the local laws then in force and "should be respected and not overruled except for cogent reasons." [Citing cases].[10]

In its supplementary opinion (R. 492–493), however, and in its conclusions of law (R. 515)[11] the District Court held that under the "facts and circumstances" the water rights of the defendants were invulnerable to attack by the United States, regardless of whether water was impliedly reserved for the Indians by the creation of the reservation in 1859. The "facts and circumstances" stated by the Court deal largely with the length of time the defendants exercised their claimed water rights without challenge by the United States.

It is the contention of the United States that, under the facts and circumstances of this case, it is not barred from the relief it seeks, either in whole or in part, by laches, estoppel, or any other recognized principle of equity.

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[10] The only "local laws" even remotely involved in this case are the Nevada laws dealing with appropriation. But neither the United States nor the defendants have raised any issue as to the construction of those laws.

[11] The supplementary opinion and conclusions of law of the District Court are fully stated, *supra*, pp. 13–15.

**1. Laches**

No principle is more firmly established than that the United States cannot, in a suit to assert a public interest, be barred by laches. As long ago as 1824 Justice Story, in *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735, said:

> The general principle is, that *laches* is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions.

In *United States* v. *Beebe,* 127 U. S. 338, 344, the Supreme Court said:

> The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt.

The Supreme Court used very similar language, quoted *infra,* pp. 41–43, in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409, a suit by the United States to enjoin an illegal use of certain of its public lands. That laches is, generally speak-

ing, no defense to a suit by the United States to enforce a public right, see also *United States* v. *Nashville &c. Ry. Co.,* 118 U. S. 120, 125; *United States* v. *Insley,* 130 U. S. 263, 266; *Steele* v. *United States,* 113 U. S. 128, 134; *United States* v. *Dalles Military Road Co.,* 140 U. S. 599, 632; *United States* v. *Michigan,* 190 U. S. 379, 405; *United States* v. *Vanzandt,* 11 Wheat. 184, 187; *Gaussen* v. *United States,* 97 U. S. 584, 590; *Lindsey* v. *Miller,* 6 Peters 666, 672; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427, 454 (S. D. Calif.).

If there is any exception to the principle that the United States cannot be barred by laches, it is limited to commercial transactions of the United States. See *Cooke* v. *United States,* 91 U. S. 389, 398; *United States* v. *Bank of the Metropolis,* 15 Peters 377, 392; *United States* v. *Barker,* 12 Wheat. 559, 561. "Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion." *Cooke* v. *United States, supra,* at 398. That the present suit is brought by the United States in its sovereign character is clear. See *United States* v. *Minnesota,* 270 U. S. 181, 194.

**2. Estoppel**

The Supreme Court, it is believed, has never held the United States estopped, despite the vast number of cases in which that contention has been

urged.[12] On the other hand, the Supreme Court has not declared that the United States can never be estopped. See *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123–124. But regardless of whether estoppel can, under any circumstances, operate against the United States, the present case is largely disposed of by the numerous holdings of the Supreme Court that the United States cannot be estopped by unauthorized acts of its agents. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, and *Cramer* v. *United States,* 261 U. S. 219, are cases especially analogous to the present case.

*Utah Power & Light Co.* v. *United States, supra,* was a suit by the United States to enjoin power companies from using certain lands of the United States for works for the generation and distribution of electric power, and to recover compensation for past use. The power companies contended that certain statutes authorized their use of the lands. This contention was resolved against them by the court. The companies further contended that the United States was barred from challenging their

[12] Of the cases examined, that most closely resembling a holding of estoppel against the United States, although it does not use that term, and although the United States was not a party to the suit, is *Lindsey* v. *Hawes*, 2 Black. 554, 560. In *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289, however, that case was referred to as resting upon a construction of acts of Congress.

right to use the lands for their works: Government officials had not only "silently acquiesced" in the expenditure of huge sums for the power works on Government lands, but had entered into agreements consenting to the construction and operation of the works. Rejecting this contention, the court said (pp. 408–409):

> In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States to the effect that the reservations would not be an obstacle to the construction or operation of the works in question; that all rights essential thereto would be allowed and granted under the Act of 1905; that consistently with this understanding and agreement and relying thereon the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that in consequence the United States is estopped to question the right of the defendants to maintain and operate the works. Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee* v. *Munroe,* 7 Cranch 366; *Filor* v. *United States,* 9 Wall. 45, 49; *Hart* v. *United States,* 95 U. S. 316;

*Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291.

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735; *Steele* v. *United States,* 113 U. S. 128, 134; *United States* v. *Beebe,* 127 U. S. 338, 344; *United States* v. *Insley,* 130 U. S. 263, 265–266; *United States* v. *Dalles Military Road Co.,* 140 U. S. 599, 632; *United States* v. *Michigan,* 190 U. S. 379, 405; *State ex rel. Lott* v. *Brewer,* 64 Alabama 287, 298; *State* v. *Brown,* 67 Illinois 435, 438; *Den* v. *Lunsford,* 20 N. Car. 407; *Humphrey* v. *Queen,* 2 Can. Exch. 386, 390; *Queen* v. *Black,* 6 Can. Exch. 236, 253. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other re-

> spects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey* v. *United States,* 240 U. S. 399, 402.

*Cramer* v. *United States, supra,* was a suit by the United States to establish the title of individual Indians to certain lands. The defendant contended that the United States was estopped to claim the lands for the Indians because officials of the United States had in the past leased the lands from the defendant for the Indians (276 Fed. 78). As to this, the Supreme Court said (261 U. S. 219, 234):

> Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights.

The *Cramer* case is authority not only that the United States cannot be estopped by unauthorized acts of its agents but, what is obvious, that its agents are not, generally speaking, authorized to affect

the title of Indians to property the United States has set aside for them. Additional authority to the same effect, upon both propositions, is afforded by *United States* v. *Morrison,* 203 Fed. 364 (C. C. Colo.), and by *United States* v. *Conrad Inv. Co.,* 156 Fed. 123 (C. C. Mont.), aff'd, 161 Fed. 829 (C. C. A. 9).

*United States* v. *Morrison, supra,* was a suit by the United States to enjoin an individual, who had purchased land in a former Indian reservation from the United States, from appropriating water for the irrigation of his land from an irrigation ditch which the United States had constructed for the benefit of Indian allottees. One of the defenses was "that the agent in charge of the Indians gave his consent, and that of the government, to the diversion of the water * * *." Rejecting this contention, the court said (203 Fed. 364, 365):

> However the fact may be on that point, it must be said that the government was not bound by anything said or done by the agent in its behalf.

*United States* v. *Conrad Inv. Co., supra,* was, like *Winters* v. *United States, supra,* a suit by the United States to enjoin the diversion, from a stream which constituted one boundary of an Indian reservation, of water needed for the domestic and irrigational needs of the reservation. The defendant contended in the District Court that the United States was estopped to challenge the de-

fendant's diversion of water, first because the Secretary of the Interior had approved the location of the defendant's canal (which traversed public lands), the plans of which revealed that the diversion now challenged would be made, and, second, because the defendant "having expended large sums of money in the construction of its canal, reservoir, and laterals, and many persons having settled in proximity thereto with a view to acquiring the use of water therefrom for irrigation and other purposes, the government ought not now to be heard to deny the rights which it encouraged the parties concerned to acquire at large expense." The Circuit Court rejected entirely the contention of estoppel. The Secretary's approval of the plan of the canal was, it held, merely a permit to cross the public lands, and not a permit to take waters.

> He has no power or authority to dispose of any of the waters of the public streams to private parties, nor can he bind the hands of the government by any acts of his looking to such a disposal. (156 Fed. 123, 131.)

The opinion continues (p. 132):

> Nor is the government estopped by the further circumstance of settlers acquiring rights in the project for irrigation purposes. The settlers must necessarily take with full knowledge of the law, and all they can obtain in that relation as against the government is what the laws of Congress have given them the right to acquire.

The issue of estoppel was apparently not raised in this Court. See 161 Fed. 829.[13]

Many of the "facts and circumstances" (summarized *supra*, pp. 5, 10–11) relied upon by the District Court in the case at bar as estopping the United States are strikingly like the facts which, in the cases just discussed, were held to be ineffectual to estop the United States. The *Utah Power & Light Co.* and *Morrison* cases are conclusive that the United States would not be estopped even if federal officials had affirmatively represented to the defendants that the waters of Walker River were open to appropriation, and the defendants, on the faith of these representations, had constructed their irrigation works. Plainly the United States is no more estopped by the mere silence of its agents. *United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123. And the application by the superintendent of the reservation to the State of Nevada for a permit to appropriate water, if it be regarded as an admission that there was no right to water without a permit, was, under the decision in the

[13] That the Government is not estopped by the mistaken assertion of facts or by the unauthorized acts of its agents, see, in addition to the cases cited in the quotation from *Utah Power & Light Co.* v. *United States*, *supra*, pp. 41–43, the following: *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31; *Jeems Bayou Club* v. *United States*, 260 U. S. 561, 564; *Utah* v. *United States*, 284 U. S. 534, 545; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120, 123; *Whiteside* v. *United States*, 93 U. S. 247, 257.

*Cramer* case, wholly unauthorized, and so could not bind the United States or the Indians.

Furthermore, the United States would not be estopped in this case even under the principles of estoppel which apply between individuals. In *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427 (S. D. Calif.), Judge Yankwich, in an elaborate opinion, recently said (p. 452):

> While acquiescence, delay (through lapse of time, limitations, or laches), or nonaction do not estop the government, the doctrine of estoppel may be asserted successfully against it when it or its agents, acting within the scope of their authority, have been guilty of acts which amount to fraud and which were acted on in good faith by others to their detriment.

As pointed out *supra,* there is no Supreme Court authority that the United States can ever be estopped. Assuming, however, that Judge Yankwich's statement of the law is correct, and assuming further, what has been shown not to be the case here, that the acts relied upon as estopping the United States were within the authority of its agents, yet the estoppel must fail for want of elements essential to an estoppel between individuals.

The opinion of Judge Yankwich, quoted above, continues (p. 452):

> All the conditions under which estoppel arises between individuals, i. e., (1) false representations or concealment of material

> facts, (2) made with knowledge to (3) a person without knowledge or means of knowledge, (4) with intention that they be acted upon, and (5) action thereon to one's prejudice * * *, or conditions tantamount to fraud actually acted upon * * *, must coexist when estoppel is invoked against the government.

In *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, the Supreme Court, speaking through Mr. Justice Field, similarly defined the elements of estoppel. It said (pp. 335–336):

> For the application of that doctrine [equitable estoppel] there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story's Eq. 391. To the same purport is the language of the adjudged cases.

*Morris* v. *Bean,* 146 Fed. 423 (C. C. Mont. 1906), aff'd. 221 U. S. 485, is also applicable. The plaintiff in that case, as here, owned lands on the lower part of a stream, and sought to enjoin diversions upstream. Defendants set up estoppel, laches, and other defenses. In holding for the plaintiff the circuit court said (pp. 434–435):

> It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not be allowed to do so, because they knew the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other.
>
> What is it that the appropriators in Wyoming have concealed which has misled the defendants to their prejudice? An estoppel of this character is based upon fraud—the inequity of asserting a right after having by silence misled a party by concealing facts which were unknown to him. Here they were equally known to both parties, hence the case does not present elements upon which an estoppel can be founded * * *.

> There is no principle of estoppel which can aid the defendants, nor can they invoke the doctrine of laches.

The application of these well established principles to the "facts and circumstances" relied upon in the instant case leads inevitably to the conclusion that this case is not within any recognized doctrine of estoppel.

Many of the facts upon which the defendants posit estoppel have to do with the delay of the United States in bringing suit. Others deal with the "acquiescence" of the United States while the defendants appropriated water and expended large sums in the construction of irrigation works in reliance upon their water rights. "No estoppel arises from mere delay, acquiescence, or nonaction, even if it results in inducing expenditures." *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427, 454. Accord: *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298 (C. C. A. 5).

The facts relied upon, other than those falling within the categories of delay and acquiescence, may be classified as (1) sale of lands to the defendants, (2) application by the superintendent of the reservation for a permit to appropriate water, and (3) the recommendation that a dam be built for the reservation. None of these facts, it is submitted, show the "intended deception" or "such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his in-

jury," which is an essential ingredient of laches (*Brant* v. *Virginia Coal & Iron Co., supra,* 93 U. S. 326, 335).

(1) The District Court found that the government officials knew (R. 398), and the Master found that they knew or should have known (R. 270), when they sold lands in the Walker River basin to the defendants or their predecessors, that the lands were valueless unless irrigated, and that they could be irrigated only from the Walker River. The Master further found (R. 271) that—

> On the other hand, it was quite patent to the white settlers that the reservation had been set aside, that several hundred Indians were living thereon, and that the government was gradually bringing the lands of the reservation under cultivation for the use of the Indians by use of water diverted from Walker River.

These facts do not bar the United States from asserting the rights of the Indians in the water of Walker River. No estoppel can arise where the means of knowledge are available to both sides. *United States* v. *Standard Oil Company of California, supra; Brant* v. *Virginia Coal & Iron Co., supra; Morris* v. *Bean, supra; Commercial Inv. Trust* v. *Bay City Bank,* 62 F. (2d) 735, 736 (C. C. A. 6, 1933); *Lancashire Shipping Co.* v. *Elting,* 70 F. (2d) 699, 701 (C. C. A. 2, 1934). Furthermore, it is absurd, in view of the immense

extent of the public domain and of the nominal prices at which it was sold, to indulge the fiction that the United States knew that a particular tract was arid, and could be irrigated only from a particular stream.[14] It was for the settlers to determine whether the land they chose was suitable for their needs.

(2) In 1910 the superintendent of the reservation filed in the office of the State Engineer of Nevada an application, on behalf of the Indians of the reservation, to appropriate certain quantities of the water of Walker River (R. 822). A permit was granted (R. 823), but was cancelled in 1921 for failure "to comply with conditions of permit" (R. 824). The Master (R. 403) and the District Court in its findings of fact (R. 498) referred to this as reliance by the United States upon the doctrine of appropriation. If the application is to be regarded as an admission that the Indians had no water rights, it was, as has been shown, wholly beyond the authority of the superintendent, and so could not bind the United States or the Indians. See *supra,* pp. 43–44, 46–47; also R. 966–967. But, in any event, there is no suggestion that the defendants relied upon the application or even knew of it.

[14] "But, as this court has said, the government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value." *Causey* v. *United States*, 240 U. S. 399, 402. See also *United States* v. *Standard Oil Company of California*, 20 F. Supp. 427, 453.

(3) In 1926 Congress appropriated money for a reconnaissance to determine to what extent the water supply of Walker River might be augmented, the feasibility of reservoir sites, the costs of rights-of-way, etc. (Act of June 30, 1926, 44 Stat. 779). A report was made to the Commissioner of Indian Affairs by a supervising engineer recommending, among other things—

> That a storage reservoir be created for the Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site, and that the irrigation system be extended to cover the entire irrigable area of the reservation. (R. 499.)

There is nothing in the record indicating that the report has ever been approved by the Indian Bureau, by the Secretary of the Interior, or by Congress. However, from the report the District Court concluded (R. 402) that "The Government's water problem at the reservation might be solved by accepting and acting upon the recommendations of its engineers." Whether the water problem of the United States "might be solved" by the building of a reservoir was not for the District Court to decide, but for Congress to consider, and its action or nonaction is no basis for an estoppel. A similar contention was rejected in *United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123. The opinion of the Circuit Court reads (p. 131):

> It is argued by counsel for defendant that water can be brought over from Badger

> creek, a stream located 13 or 14 miles north of Birch creek, for irrigation of all the Birch creek lands. This, however, is a project of doubtful utility; but conceding that it could be successfully carried out, the government is not required to do so, when the waters of the latter stream are much more available, and are as much subject to use upon the reservation as those of Badger creek. The suggestion is clearly one of expediency, of which the Interior Department ought to be the sole judge, as it is a matter for its initiative, acting in its administrative capacity, in determining the occasion and the needs of the government pertaining to the waters flowing in the stream along and upon the reservation.

Finally, the instant case has a special aspect which would in any event prevent the operation of an estoppel. It is hornbook law that the relationship between the Government and Indians is that of guardian and ward. *United States* v. *Kagama,* 118 U. S. 375, 382–384; *Cramer* v. *United States,* 261 U. S. 219, 232; *United States* v. *Payne,* 264 U. S. 446, 448. A ward is not estopped by the acts of its guardian. *Telegraph Co.* v. *Davenport,* 97 U. S. 369, 373; *Harmon* v. *Smith,* 38 Fed. 482, 486 (C. C. Minn.). In *Hammons* v. *National Surety Co.,* 36 Ariz. 459, 469; 287 Pac. 292, 295, the court said:

> We are of the opinion that a guardian cannot on behalf of his ward waive any sub-

> stantive right of the ward or by his conduct estop the ward from recovering what is due the latter.

This rule has received wide application in state jurisdictions.[15] Especially pertinent here is *Shamleffer* v. *Peerless Mill Company,* 18 Kan. 24, holding that the conduct of a guardian in permitting a lower riparian owner to divert water from a stream did not estop the ward from asserting her right to the flow of the entire stream in its natural channel. The court said (p. 32):

> There is no pretense that she [the ward] knew anything of the work, or any claim that her conduct worked any estoppel, if indeed the knowledge and silence of an infant can ever be construed into an estoppel. And as to the knowledge and silence of her executor and guardian, that certainly can work no estoppel as against her.

Thus, even if the facts of this case otherwise satisfied the requirements for an estoppel, there could still be no estoppel because of the wardship status of the Indians.

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[15] In *Levant State Bank* v. *Shults*, 142 Kan. 318, 47 P. (2d) 80, 82, it was said: "No default or silence of his [the guardian] can be used to bar them [the wards] of their rights." Accord: *Headley* v. *Hoopengarner*, 60 W. Va. 626, 55 S. E. 744, 751; *Reynolds* v. *Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985, 988; *Burnham* v. *Porter*, 24 N. H. 570, 580; *Draper* v. *Clayton*, 87 Neb. 443, 127 N. W. 369, 372.

### 3. Equitable rules

As we have seen, the Master expressed the view that, although the United States was not estopped to assert the implied reservation of water for the Indians in 1859, it would be inequitable to allocate to the United States water for the irrigation of any land in excess of 2,100 acres, the amount of land already under irrigation, since the Indians did not desire the irrigation of additional lands (R. 275). The Master accordingly recommended that the United States be given a right to 26.25 cubic feet of water per second, for the irrigation of 2,100 acres of land of the reservation, with a priority of November 29, 1859 (R. 310–311).

It is, of course, true that the United States is, generally speaking, subject, as a suitor, to the principles of equity. See *Brent* v. *Bank of Washington,* 10 Peters 569, 614. This rule is, however, subject to exceptions. Laches and estoppel, both doctrines of equity, apply to the United States only to a limited extent, if at all. Nor does the rule mean, as the Master apparently thought, that the legal rights of the United States are to be determined upon general notions of fairness; the United States is subject to *principles* of equity as is an ordinary litigant, but cases are not to be decided against it upon amorphous concepts of justice without regard to precedent or established principles. Nor will equitable principles be applied against the United States "to frustrate the purpose of its

laws or to thwart public policy." *Pan American Co.* v. *United States,* 273 U. S. 456, 506.[16] See also *Causey* v. *United States,* 240 U. S. 399, 402; *Heckman* v. *United States,* 224 U. S. 413, 446–447.

When the Walker River Indian Reservation was created there was impliedly reserved for the Indians water sufficient for the irrigation of all of the irrigable lands of the reservation. No principle of equity would justify permanently depriving the Indians of all of the water reserved for them in excess of the amount they are now using. And if there were any such principle it would, so applied, plainly "frustrate the purpose" of the laws of the United States and would "thwart public policy."

In *United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123 (aff'd by this Court, 161 Fed. 829), the Circuit Court observed that the Government, as guardian of the Indians, had a most important trust to perform.

> * * * that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future needs, when they have ultimately secured their allotments in severalty. What

[16] In that case the Supreme Court held that the United States need not, in a suit to cancel contracts for fraud, tender compensation to the defendant for services accepted by the United States under the contract. Similarly in *Heckman* v. *United States*, 224 U. S. 413, that court held that the United States need not, in a suit to set aside sales of restricted Indian lands, tender back the purchase prices.

> these needs will be cannot be definitely determined. For the present, the matter is administrative in its detail. These Indians are now but the wards of the government. As it pertains to the lands which the government is holding in trust for them, it is administering them for their proper use and benefit, and in its administrative capacity it ought to be the judge of what amount of the waters of the streams adjacent to the reservation is or will eventually be essential for the needs of the Indians for use in connection with their lands. (P. 129.)

The evidence in that case disclosed that some eight or ten thousand acres of land of the reservation were irrigable, but that only a small part of that acreage was irrigated by the Indians. The Circuit Court, accordingly, allowed a certain quantity of water based upon the present needs of the Indians, and concluded (p. 132):

> * * * the government will have leave to apply for a modification of this decree at any time that it may determine that its needs will be in excess of the amount of water so designated.

The decree of the trial court was affirmed by this Court (*Conrad Inv. Co.* v. *United States,* 161 Fed. 829). This Court said (p. 832):

> The lands within these reservations are dry and arid and require the diversion of waters from the streams to make them productive and suitable for agricultural, stock raising,

> and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case.

And the opinion of this Court concludes (p. 835):

> It is further objected that the decree of the circuit court provides that whenever the needs and requirements of the complainant for the use of the waters of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification.

What the future needs of the Indians in the present case will be cannot be now determined. They are entitled to have their prior right to 150 cubic

feet per second of the water of the river (that is, water sufficient for the irrigation of all of the irrigable lands of the reservation) recognized in this proceeding, as sought in the amended complaint (R. 17). On the other hand, the Government does not wish absolutely to deprive the defendants of water which the Indians do not need at the present time, and which they may never need. A decree like that approved by this court in the *Conrad Inv. Co.* case is a possible solution. Such a decree would, however, be open to the objection, both from the standpoint of the district court and of the United States, that a modification of the decree would be necessary every time a few additional acres on the reservation were brought under irrigation. Nor would such a decree secure to the defendants the benefit of any reduction in the amount of water used by the Indians, due to temporary abandonment, permitting tracts to lie fallow in crop rotation, etc. A preferable solution, it is believed, is a decree adjudging that the United States has the right to divert water from the Walker River up to a maximum of 150 cubic feet per second, with a priority of November 29, 1859, for the irrigation of 10,000 acres of land of the reservation, and providing that the United States shall inform the water master appointed by the court, prior to the commencement of each irrigation season, of the amount of water which will be needed for the reservation that season, up to the

maximum amount of water decreed to it. Under a retention of jurisdiction clause such as is now included in the decree (R. 535), any defendant aggrieved or injured by an act or omission of the water master could apply to the court for relief.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the decree of the district court should be reversed.

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